IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1888 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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MATHEW M. S.

Versus

MANAGER, M.J. INTERNATIONAL

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Appearance:

1. Special Civil Application No. 1888 of 1993

MR AR THACKER for Petitioner No. 1

MS VASUBEN P SHAH for Respondent No. 1

MS KJ BRAHMBHATT for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 18/09/2003

ORAL JUDGEMENT

Heard learned advocate Mr. A.R. Thakkar for the petitioner and Ms. K.J. Brahmbhatt for the respondent. In this petition, the petitioner workman has challenged the award made by the labour court concerned in Reference No. 1750 of 1987 dated 13th November, 1992 wherein the reference made at the instance of the workman was dismissed by the labour court, Rajkot.

Learned advocate Mr. Thakkar for the petitioner workman has submitted that the labour court has committed grave error in rejecting the reference. He also submitted that the facts were admitted by the respondents before the labour court as appearing from paragraph 6 that the name of the petitioner has been struck off from the muster roll without complying with the provisions of section 25F of the Industrial Disputes Act, 1947. He submitted that in view of such admission of the respondent, it ought to have been held by the labour court that the action of the respondent was violative of section 25F of the ID Act, 1947. According to the submissions made by Mr.Thakkar, once the name of the petitioner has been struck off from the muster roll, it amounts to retrenchment within the meaning of section 2(oo) of the ID Act, 1947 and in such circumstances, retrenchment procedure is required to be followed by the respondents meaning thereby, respondents are required to comply with the mandate of section 25F of the ID Act, 1947 which was not followed by the respondents while strucking off the name of the petitioner from the muster roll and, therefore, the action of strucking off the name of the petitioner from the muster roll was violative of section 25F of the ID Act and, therefore, the labour court ought to have made the award of reinstatement in favour of the petitioner. He also submitted that the labour court has erred in concluding that the petitioner has left the job or has abandoned the work. He relied upon the decision of the Hon'ble apex court in the matter of L. Robert D'Souza versus The Executive Engineer, Southern Railway and another reported in AIR 1982 SC 854.

On the other hand, learned advocate Ms. Brahmbhatt appearing for the respondent has submitted that the labour court was right in appreciating the evidence before it; the labour court has not committed any error in rejecting the reference made at the instance of the petitioner; the labour court was right in holding that the petitioner abandoned the work; the labour court was right in not granting relief in favour of the petitioner. She also submitted that the workman had abandoned the work and the labour court was right in coming to such conclusion. According to her submissions,

the labour court has recorded the findings of facts after appreciation of the evidence on record and, therefore, this court may not interfere with the same in exercise of the powers under Article 227 of the Constitution of India. She has, thus, supported the award made by the labour court.

I have minutely perused the award made by the labour court. I have also considered the submissions made by the learned advocates for the parties. Considering the facts of the present case, the petitioner workman was working in the establishment of the present respondent since last six years. On 22.7.1987, during the course of his employment, there was accident and he received injury on his hand and, therefore, he was shifted at the hospital for treatment. According to the facts of the workman, since there was nobody to look after the workman at Gandhidham, the petitioner informed the establishment and he had gone at the residence of his brother who was residing at Mumbai and from there, he had submitted medical certificates to the establishment. After the petitioner was declared fit for service by the Doctor, the applicant had joined the service on 4.8.1987 and had submitted the certificates to the respondent Company. The petitioner was also present on 5.8.1987 and was doing the work in a routine manner. By that time, at the noon hours, he was called by the Manager of the respondent company and he was given discharge by way of oral order by informing that he is not required to come for work from the next day and you should collect the account. According to the petitioner, no inquiry was initiated against the petitioner and order of termination or dismissal has not been passed in writing. The petitioner had demanded for reinstatment before the respondent company on 12.8.1987 but the respondent company has not taken any steps and, therefore, the petitioner raised industrial dispute which was in turn referred to the labour court concerned for adjudication.

Before the labour court, statement of claim was filed by the petitioner and reply thereto was filed by the respondent at Exh. 6. Thereafter, the workman had produced certain documetns vide Exh. 8. Certain documents were also produced by the workman vide Exh. 9 to 24 which includes the letter addressed to the company by the petitioner, his identity card, presence card and leave account and the medical certificate. Before the labour court, the workman was examined vide Exh. 17 and on behalf of the respondent, one Sureshbhai Parekh was examined at Exh. 27 and, thereafter, evidence was closed before the labour court.

Considering the impugned award made by the labour court, in para 7 of the impugned award, the labour court has given the reasons. It was not in dispute that the petitioner was working with the respondent company. It was also not in dispute that the petitioner while he was in service met with accident on 22.7.87 and received injury on his hand and he was shifted in the hospital for treatment by the company. It came to the conclusion that the petitioner was workman of the respondent company. It also came to the conclusion that the factum of incident occurred on 22nd July, 1987 was also not disputed by the respondent company wherein the workman was required to have treatment and the respondent had shifted him for treatment in the hospital. It was also not in dispute that the workman had send medical papers from Bombay to the respondent company. Medical treatment was taken by the petitioner at Bombay upto 3.8.1987. After recording such undisputed facts, the labour court appreciated the contentions of the petitioner raised in his statement of claim wherein it was submitted by the petitioner that at Gandhidham, there was nobody to look after him for his treatment and, therefore, he had gone at Bombay at his brother's house after informing the respondent company at Gandhidham and had submitted medical certificate from there to the company. Same story was reiterated by the petitioner in his oral evidence before the labour court that he had gone at Bombay for treatment with the leave of the company; he received treatment at Bombay upto 3.8.87. Thus, from the deposition of the workman, it was appearing that he had gone at Bombay for treatment with leave of the company. Thereafter, the labour court appreciated the reply of the respondent company wherein it was submitted that it is incorrect that there was nobody to look after the petitioner in Gandhidham for looking after the petitioner and, therefore, the petitioner had gone at the place of his brother. It was submitted by the respondent in its reply that as a matter of fact, the petitioner had remained absent continuously without obtaining leave and, therefore, his name has been struck off from the muster roll. Witness for the respondent company Mr. Suresh Parekh had also not disputed these facts in his oral evidence at Exh. 27 before the labour court but it was his case that the petitioner abandoned his work. In para 6 of the award, it was accepted by the advocate for the respondent company that it is true that the petitioner met with an accident on 22.7.87; whole expenses in that regard was incurred by the company and proper treatment was provided but thereafter the petitioner had not resumed the work and, therefore, his name has been deleted from the muster

roll. Thus, from the appreciation of the evidence on record made by the labour court, it is clear that the name of the petitioner was struck off from the muster roll and yet the labour court believed the case of the respondent company that the petitioner abandoned the work and, therefore, he is not entitled for the relief of reinstatement and the labour court, therefore, rejected the reference. Thus, there are contradictory findings given by the labour court. From the record, it was clear that the name of the petitioner was struck off from the muster roll and it was not the case of the respondent company that before doing so, any procedure as required under the law was followed by the petitioner company. In view of that, the labour court ought to have appreciated that the action of deleting name from the muster roll amounts to retrenchment within the meaning of the ID Act, 1947. That is the basic error committed by the labour court and the findings recorded by the labour court in that regard are contrary to the facts on record and are, therefore, perverse in nature. In para 6 of the award, the labour court has come to the conclusion that the workman was the employee of the respondent; accident occurred on 22.7.1987 and the workman had left place of working and went to Bombay for treatment but the labour court was of the view that no leave report has been sent by the workman from Bombay to the respondent for remaining absent continuously and, therefore, his name was struck off from the muster roll. While forming such conclusions, the labour court has committed error in giving findings contradictory to each other. At one time, the labour court concluded that the name of the petitioner was struck off from the muster roll and immediately on the next line, gave contradictory finding that the petitioner had abandoned the work. These are the findings contradictory to each other. If it is believed that the name of the petitioner has been deleted from the muster roll, then, there is no question of his reporting for duty. This itself is sufficient to hold that this is the basic error committed by the labour court and the findings are, therefore, perverse in nature which error is required to be corrected by this court in exercise of the powers under Article 227 of the Constitution of India.

The reasons given by the labour court after appreciation of the oral and documentary evidence on record and the ultimate conclusions drawn by the labour court are contradictory to each other. At one place, the labour court has believed the say of the respondent company that the name of the petitioner was struck off because of continuous absence of the petitioner and in

view of that, it was not necessary for the labour court to give contradictory finding that the workman had abandoned the job at his own.

The labour court has also committed gross error in not appreciating the legal position prevailing in respect of the provisions under section 2(oo) of the ID Act, 1947. Section 2(oo) of the ID Act, 1947 has defined the term retrenchment which covers termination of any kind except those which are covered by the exceptions as provided in section 2(oo) of the ID Act. The question is, in case, if the name of the workman has been deleted from the muster roll, whether it amounts to retrenchment or not and at that time, whether it is necessary for the employer to comply with section 25F of the ID Act, 1947 or not. This question has been examined by the Hon'ble Apex Court in the matter of L. Robert D'Souza versus The Executive Engineer, Southern Railway and another reported in AIR 1982 SC 854. Said question has also been examined by the apex court in the matter of Delhi Cloth and General Mills Ltd. v. Shambhu Nath Mukherji reported in AIR 1978 SC 8 : (1978) 1 SCR 591. Relevant observations made by the apex court in para 7 of the matter are reproduced as under:

"7.As we are not prepared to examine the contention over As we are not prepared to examine the contention over again, the submission of Mr. Francis that 'retrenchment' contemplates some overt act on the part of the employer, that it inheres the principle of last come first go which again requires an overt act on the part of the employer; that when retrenched workmen and required to be re-employed, first option for re-employment has to be given to the retrenched workmen, which necessitates some overt act on the part of the employer, would be beside the point and of no relevance and significance. The reference to Rules 76, 77 and 78 of the Industrial Disputes (Central Rules). 1957, does not advance his case a step further. The definition of expression 'retrenchment' in s. 2(oo) is so clear and unambiguous that no external aids are necessary for its proper construction. Therefore, we adopt as binding the well settled position in law that if termination of service of a workman is brought about for any reason whatsoever, it would be retrenchment except if the case falls within any of the excepted categories, i.e., (i) termination by way of punishment inflicted pursuant to disciplinary

action; (ii) voluntary retirement of the work man; (iii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; (iv) or termination of the service on the ground of continued ill-health. Once the case does not fall in any of the excepted categories the termination of service even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in s. 2(oo). It must as a corollary follow that if the name of the workman is struck off the roll that itself would constitute retrenchment, as held by this Court in Delhi Cloth & General Mills Ltd. case. We specifically refer to this case because the facts in the case before us are on all fours with the facts in the aforementioned cases and on parity of reasoning and judicial comity the same conclusion must follow unless something to the contrary is indicated. In that case respondent S. N. Mukherji who was recruited as a labourer came to be promoted in course of time to the post of Motion Setter. On October 1, 1964, pursuant to some re-organisation in the establishment the post of Motion Setter was abolished. The management offered employment to the respondent S. N. Mukherji on any other suitable post, which was indicated to be the post of Assistant Line Fixer (Assistant Grade I) without loss of wages. He was to be on probation. The management found him unsuitable for this post even after extending the period of probation by 9 months and therefore offered him post of Fitter on the same pay which he, as a Motion Setter, used to get. The response of S. N. Mukherji to this offer was that he should be given a further opportunity to show his efficiency in his job and if he fails to improve, he would tender his resignation voluntarily. The management did not reply to the letter with the result that the workman did not report for work at the newly offered post. On January 19, 1966, the management wrote to the workman that his name has been struck off from the rolls with effect from August 24, 1965, for continued absence without intimation. Such termination of service was held to be covered by the expression 'retrenchment' and it was struck down on the ground that the pre-condition to valid retrenchment was not

> complied with. It would thus appear that it is consistently held by this Court that termination of service for any reason whatsoever except the excepted categories would constitute retrenchment within the meaning of the expression in the Act. And here recall the order of termination of service of the appellant wherein it is stated that "You have absented yourself unauthorisedly from 19.8.1974 and hence your services are deemed to have been terminated from the day you have absented yourself." Is any other conclusion possible save and except the one recorded by this Court in Delhi Cloth & General Mills Ltd case that this constitutes retrenchment and for non-compliance with precondition, it is invalid."

In view of the above observations made by the apex court that it must as a corollary follow that if the name of the workman is struck off the roll that itself would constitute retrenchment, and also considering the facts of the present case, considering the reply of the respondent company before the labour court and also considering the evidence on record before the labour court, it is clear that the name of the workman was struck off from the muster roll which action amounts to termination. It was not the case of the respondent company either before the labour court or before this court that before taking such an action, procedure ought tobe followed has been followed by them. Thus, it is clear that the name of the petitioner was deleted from the muster roll without complying with the mandatory provisions of section 25F of the ID Act, 1947 which is a condition precedent for retrenchment and absence thereof has vitiated the action. In view of these facts, I am of the opinion that the labour court has committed gross error in giving findings contradictory to each other and has erred in rejecting the reference of the petitioner though it was clear that the name of the petitioner was struck off by the respondent company from the muster roll without following the mandatory provisions of section 25F of the ID Act, 1947. The findings given by the labour court are, therefore, perverse and the award made by the labour court on the basis of such findings is also required to be quashed and set aside in exercise of the powers under Article 227 of the Constitution of India in view of the law laid down by the Hon'ble Apex Court in AIR 1978 SC 8 and AIR 1982 SC page 854.

While dismissing the reference of the workman, the question for back wages for the intervening period has not been examined by the labour court. Before the

labour court, the workman has deposed at Exh. 17 wherein it was specifically deposed by the workman that at the time of retrenchment, no notice or no notice pay in lieu of notice has been paid to him. He also deposed that he was not gainfully employed in any establishment during the intervening period. These assertions made by the workman in his oral evidence were not controverted by the other side before the labour court. Before this court also, the respondent company has not been able to submit that the petitioner was doing any work and was earning anything or that he was employed in any establishment gainfully and, therefore, he is not entitled for any back wages for the intervening period. Therefore, considering the evidence on record, I am of the opinion that the petitioner is entitled for the relief of reinstatement with full back wages for the intervening period with all consequential benefits including continuity of service.

Therefore, in view of the aforesaid discussion, the award made by the labour court in Reference No. 1750 of 1987 dated 13th November, 1992 is hereby quashed and set aside. Said reference is hereby allowed by directing the present respondent company to reinstate the present petitioner in service with continuity of service and full back wages for the intervening period from the date of his retrenchment till the date of his actual reinstatement with all other consequential benefits within three months from the date of receipt of copy of this order. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Dt. 18.9.2003. (H.K. Rathod,J.)

Vyas